IN THE REGIONAL DIVISION OF MPUMALANGA

(HELD AT NELSPRUIT REGIONAL COURT)

Case No: SH 865/10

In the matter between:

The National Director of Public Prosecutions **Applicant**

and

York Timbers Ltd **Defendant**

(as represented herein by David Mallock-Brown)

In re: State vs York Timbers Ltd.

An application for a confiscation order in terms of section 18(1) of Prevention of Organised Crime Act 121 of 1998 (**the POCA**).

THE APPLICANT'S ADDITIONAL HEADS OF ARGUMENT

INTRODUCTION

1 On 26 November 2012, the Honourable court ruled that the Applicant be given an opportunity to serve and file additional Heads of Argument in response to the Heads of Argument that was filed on behalf of the Defendant.

2 This was after the Defendant had served and filed their Heads of Argument on the Applicant and the Honourable court in court on 26 November 2012.

3 The matter was postponed to 10 December 2012 in the Nelspruit Regional Court for legal arguments.

4 In this additional Heads of Argument the Applicant will address the following issues that were raised in the Defendant's Heads of Argument:

4.1 Does the Applicant bears the onus to prove all issues in the Section 18 enquiry?

4.2 Should the Honourable court exclude the contents of the replying affidavit that was filed on behalf of the Applicant?

4.3 The nature of the benefit that the Defendant received or derived;

4.4 When was the benefit received or derived by the Defendant?

4.5 Does O'Beirne's affidavit amounts to hearsay?

4.6 The lack of legal authority for the Defendant's submissions;

4.7 The deterrent effect of a confiscation order; and

4.8 Is the Defendant, *in casu*, entitled to ask for the costs of senior counsel?

IS THERE AN ONUS OF PROOF UPON THE APPLICANT

5 In paragraph 14 of the Defendant's Heads of Argument (**see page 11**), it is submitted that:

"14.1 The Applicant bears the onus to prove all issues relevant and required for an order of this nature. This must be proved on a balance of probabilities.

14.2 The approach that a Court should adopt in the event of factual disputes in proceedings of this nature (motion proceedings). These proceedings are clearly motion proceedings brought by way of notice of motion supported by affidavits. As is provided in section 13 of POCA the ordinary principles of civil procedure should then follow."

6 These submissions of the Defendant are not in accordance with the provisions of the POCA and are not based upon any legal authority.

7 As stated in paragraph 49 of the Applicant's Heads of Argument (**see page 22**) the provisions of Section 18 of the POCA clearly states that these proceedings are inquisitorial in nature. They take the form of an enquiry undertaken by the court itself. It is the court's enquiry held

subject to its control and not the parties' *lis* placed before the court for its determination.

8 Section 18 reads:

"(1) Whenever a defendant is convicted of an offence ***the court*** *convicting the defendant* ***may****, on application of the public prosecutor,* ***enquire into any benefit*** *which the defendant may have derived ..... and if* ***the court*** *finds that the defendant has so benefited,* ***the court*** *may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate and* ***the court*** *may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.*

(2) The amount which ***a court may*** *order the defendant to pay to the State under subsection (1)*

(a) shall not exceed the value of the defendant's proceeds of the offences or related criminal activities referred to in that subsection, as ***determined by the court*** *in accordance with the provisions of this Chapter; or*

(b) if ***the court is satisfied*** *that the amount which might be realised ...*

(3) ***A court*** *convicting a defendant may, when passing sentence, indicate that it will hold an enquiry contemplated in subsection (1) at a later stage if ....*

(6) ***A court*** *before which proceedings under this section are pending may ....* (**my highlights**)

9 Section 21(1)(a) reads:

"The public prosecutor ***may*** *or, if so directed by the court, shall tender to the court a statement in writing under oath ...."* (**my highlights**)

10 The quoted provisions of the POCA make it clear that:

10.1 The confiscation enquiry is an inquisitorial process wherein the court plays the active role to establish if the Defendant has benefitted from its criminal activity. The word ***"court"*** appears numerous times in this legislation (at least 9 times in the above mentioned provisions).

10.2 Section 18(1) makes it clear that the only application of the public prosecutor (the Applicant) is to initialize the confiscation enquiry process. If the court grants the Applicant's application to hold a confiscation enquiry, like *in casu*, it is the court's inquisitorial enquiry. The intention of the legislature is clear that, after the court grants the holding of a confiscation enquiry,

the *onus* is on the court to take ownership of the proceedings and establish whether or not the Defendant has benefitted out of his criminal activity.

10.3 There is no provision in the POCA that states, as the Defendant submits, that during the confiscation enquiry process, the Applicant bears an *"onus to prove all issues relevant and required for an order of this nature."*

10.4 Furthermore, Section 21(1)(a) of the POCA makes it clear that the legislature never indented to burden the Applicant with an *onus* of proof. It states that the *"the public prosecutor **may** ... tender to the court a statement in connection with any matter which is being enquired into by the court under section 18(1)".* It gives the prosecutor a discretion to submit such evidence. If it was the legislature's intention to burden the prosecutor with an *onus* of proof, it would have stated that the prosecutor **MUST** submit such evidence.

11 In any inquisitorial process, where the court is the driver of such a process, there can never be any notion of an *onus* of proof on any of the parties.

12 Section 21(3)(a) also provide that the court may order a Defendant to tender a statement in writing *"in connection with any matter which*

relates to the determination of the amount which might be realised as contemplated in section 20(1)." This provision further shows that the legislature never intended to burden the Applicant with an onus *"**to prove all issues** relevant and required for an order of this nature." (*as the Defendant submitted in his Heads of Argument).

13 From the wording of Sections 13(5), read with Sections 21(2)(b) and 21(4)(b) of the POCA, it is furthermore clear that the legislature had no *onus* on the Applicant in mind. Section 13(5) clearly states:

"Any question of fact to be decided by a court in any proceedings in respect of an application contemplated in this Chapter shall be decided on a balance of probabilities."

It does not provide that the factual averments of the Applicant alone must be proven on a balance of probabilities. Any factual averment before the court, irrespective by which person or party it was submitted, must be decided on a balance of probabilities.

14 There is also no legal support in the POCA and the common law for the Defendant's submission that *"these proceedings are clearly motion proceedings brought by way of notice of motion supported by affidavits."*

15 Section 18 of the POCA does not provide that these proceedings be brought by way of a notice of motion, supported by affidavits. As mentioned above, Section 18 has *sui generies* provisions:

15.1 After a defendant is convicted of an offence, the public prosecutor applies that a confiscation enquiry be held; and

15.2 If the court grants such an initial application by the prosecutor, the court, in an inquisitorial manner, holds the enquiry.

16 There is no provision in the POCA that a confiscation enquiry be instituted by the Applicant by way of a Notion of Motion, supported by affidavits. This is a further indication that the legislature never intended to burden the Applicant with an *onus* of proof.

17 There is also no legal authority in support of the Defendant's notion that there is an *"onus on the Applicant to prove all issues relevant and required for an order of this nature."* The Defendant was also unable to quote any legal authority in support of its submissions in this regard.

18 Seeing that there is no *onus* of proof on the Applicant in these confiscation proceedings, the Defendant's submissions in paragraphs 15 to 19 of their Heads of Argument (**see pages 11 to 14**) are irrelevant, superfluous and not applicable. The proceedings under Section 18(1) are *sui generies* and not brought on Notice of Motion,

accompanied by affidavits. The Plascon-Evans rule is therefore not applicable to these proceedings. The POCA specifically makes provision of how any factual averment should be handled by the inquisitorial court.

SHOULD THE HONOURABLE COURT EXCLUDE THE CONTENTS OF THE REPLYING AFFIDAVIT THAT WAS FILED ON BEHALF OF THE APPLICANT?

19 In paragraphs 11 and 12 of the Defendant's Heads of Argument (**pages 6 to 9**) they submit that the replying affidavit that was filed on behalf of the Applicant should be excluded by the court for two reasons:

19.1 The POCA does not make provision for the filing of any replying affidavit(s); and

19.2 The Applicant filed the replying affidavit late.

The POCA does not make provision for the filing of replying affidavit(s)

20 As stipulated above, the POCA empowers the Honourable court to conduct an enquiry into the benefit of the Defendant out of his criminal activity. This is done in an inquisitorial manner.

21 Section 18(6) of the POCA provides that:

"A court before which proceedings under this section are pending, ***may***

(i) refer to the evidence and proceedings at the trial;

(ii) hear such further oral evidence as the court may deem fit;

(iii) direct the public prosecutor to tender to the court a statement referred to in section 21(1)(a); and

(iv) direct a defendant to tender to the court a statement referred to in subsection (3)(a) of that section." (**my highlights**)

22 The word **"may"** in the above mentioned section indicates that the Honourable court is not bound only by the evidence mentioned in (i) to (iv) above. It is clear from the wording of this section that the legislature never intended that the evidence that the court can take cognisance of in (i) to (iv) should be a *numerous clauses*, as the Defendant incorrectly submits.

23 The provisions of Section 18(6) of the POCA should be read in conjunction with the provisions of Section 21 of the POCA. Section 21 provides that the court can order the public prosecutor or any other person to file an affidavit in connection with any matter which is being enquired into by the court under Section 18(1). According to Section 21(3)(a), the court can also order the Defendant or any other person to file an affidavit in connection with any matter which relates to the

determination of the amount which might be realised as contemplated in Section 20(1). These provisions clearly show that it was never the intention of the legislature to tie the inquisitorial court's hands by providing that only initial affidavits be filed. The intention of the legislature is clearly to give the inquisitorial court extensive powers to order the filing of affidavits that can properly ventilate all issues in the confiscation enquiry process.

24 It is submitted that it is also not in the interest of justice that the hands of the court should be bound in an inquisitorial process. The purpose of such a process is to obtain all relevant evidence that can properly ventilate all issues in the confiscation enquiry. If the Honourable court deems it necessary that a replying affidavit be filed, it is within the intention and purpose of the legislature with these provisions.

25 Furthermore, i*n casu* there was a specific agreement between the Applicant and the Defendant that the Applicant will file a replying affidavit and that was made an order of court (see **Annexure "DMB 6" page 326 of the record**). It is incomprehensible how the Defendant can now in his Heads of Argument ask for the exclusion of a process which was agreed upon by the parties.

26 The Applicant finds it suspiciously strange that the Defendant now on technical arguments attempts to exclude the replying affidavit. It is

submitted that the motive behind this technical ploy is because the Defendant realised that the contents of the replying affidavit are significantly detrimental to its case.

The late filing of the replying affidavit

27 The Applicant's replying affidavit was filed late.

28 However, what the Defendant deliberately omitted to inform the Honourable court in its Heads of Argument, is that the Defendant's answering affidavit was also filed late. The legal authorities are clear that filing entails both service of the papers on the opposite party, as well as filing thereof at court.[1]

29 According to paragraph 3.4 of the court order dated 11 July 2012 (**see annexure "DMB 6" to the Defendant's answering affidavit – page 325 of the court papers**) the Defendant was suppose to file his answering affidavit on 5 October 2012.

30 The filing notice of the Defendant's answering affidavit (**see pages 249 and 250 of the court papers**) shows that the Defendant's answering affidavit was served on the Applicant on 8 October 2012. The Defendant's answering affidavit was therefore filed out of time.

---

[1] **See: Mahlangu and Another v Van Eeden and Another 2000(3) SA 145 at para 27; Levy v NDPP 2002(1) SACR 162 at para 9**

31 If the Honourable court on this (unwarranted) basis excludes the Applicant's replying affidavit, then surely the Defendant's answering affidavit should also be excluded on the same basis. It will leave the Honourable court only with the unchallenged evidence as contained in the Applicant's founding affidavit and the confiscation order should be granted.

32 Furthermore, the Applicant throughout the drafting of the replying affidavit, kept the Defendant's attorneys informed about the reasons for the late filing of the replying affidavit. In none of the exchanged e-mail correspondence did the Defendant's attorneys showed their dissatisfaction or objected against the late filing of the replying affidavit. The Defendant's attorneys tacitly agreed to the late filing of the replying affidavit, maybe in the light of their own late filing of their answering affidavit.

33 In the light of the inquisitorial nature of the confiscation enquiry, the Applicant submits that the Honourable court has a discretion to allow both the answering affidavit of the Defendant and the replying affidavit of the Applicant as part of the evidential material. Seeing that these affidavits are supposed to assist the Honourable court to come to a just decision in this matter, it will be in the interest of justice to allow these affidavits as part of the evidential material to consider.

34 In any case, most of the contents of the Applicant's replying affidavit are highlights and referrals to the contents of the Applicant's founding papers. In the replying affidavit, O'Beirne mostly referred to the evidential material as contained in the Applicant's founding papers, in response to the averments as contained in the Defendant's answering affidavit (**see specifically paragraphs 7 to 64 of O'Beirne's replying affidavit**).

35 Seeing that the contents of specifically **paragraphs 7 to 64** of O'Beirne's replying affidavit are only highlights and referrals to the existing evidential material of the Applicant's founding papers, the contents thereof can just as well be argued by the Applicant. The Applicant therefore incorporates the contents of these specific paragraphs as part of the Applicant's Heads of Argument.

36 It is submitted that there exist no legal and factual basis for the Honourable court to exclude the contents of the Applicant's replying affidavit. The Applicant requests the Honourable court to allow the replying affidavit as part of the evidential material to be considered.

THE NATURE OF THE BENEFIT THAT THE DEFENDANT RECEIVED OR DERIVED

37 In paragraph 21 of the Defendant's Heads of Argument it is submitted that *"the material question to be answered is whether the Defendant in*

this case in fact derived benefit from the offence (broadening of the road) as envisaged in Section 18 of POCA."

38 This was never the material question to be adjudicated upon. The Applicant's papers never averred that the Defendant derived a benefit from the offence of *"broadening of the road*." The statutory offence for which the Defendant was convicted is not the *"broadening of the road"*, but the illegal commencement of a listed activity in terms of the NEMA without obtaining environmental authorisation.

39 The benefit(s) that the Applicant throughout its papers avers is the financial savings the Defendant received or derived from its deliberate avoidance or evasion of the provisions of a statutory regime, namely, the NEMA and the relevant regulations thereto. The offence for which the Defendant was convicted is not the *"broadening of the road"*, but the illegal commencement of a listed activity without environmental authorisation. In other words, the deliberate avoidance or evasion of the prescribed legal procedure and financial consequences thereof.

40 As submitted in paragraph 30 of the Applicant's Heads of Argument (**see page 15**), this type of benefit is similar to tax or customs and excise duty evasion. It is the evasion or avoidance of a prescribed regulatory regime. You must pay tax and you must pay customs and excise duty. In this case, the NEMA and its regulations prescribe that

you must appoint an EAP (Environmental Assessment Practitioner) who must conduct and submit an EIA or BAR. If one evade or avoid these provisions, you are benefitting.

41 *In casu,* it means that the Defendant has intentionally evaded or avoided a prescribed statutory regulatory regime that provide for how one must go about to obtain environmental authorization before one commence with a listed activity. According to the regulations to the NEMA, one must obtain the services of environmental experts who must conduct and submit an environmental impact assessment or basic assessment report (BAR).

42 In the Defendant's quest for profit, they intentionally avoided or evaded the provisions of the NEMA and its regulations. To employ the services of experts to conduct an EIA or BAR would have cost them money, so they deliberately elected to evade or avoid these costs and therefore the provisions of the NEMA. Therein lays their benefit.

43 The Defendant's definition of the *"material question to be answered"* in paragraph 21 of its Heads of Argument is thus clearly wrong.

WHEN WAS THE BENEFIT RECEIVED OR DERIVED BY THE DEFENDANT?

44 In paragraph 40.1 of the Defendant's Heads of Argument (**page 25**), the Defendant submits the following:

"The contention that the Defendant derived any benefit by certain savings as alleged has no merit because the Defendant did in fact appoint an certified environmental assessment practitioner to conduct an EIA that is required to obtain an environmental authorisation and did in fact incur the costs associated with his appointment and the process that were followed (paragraph 26)."

45 This submission of the Defendant does not take into account the comprehensive argument on behalf of the Applicant under the heading: ***"The benefit out of the crime is determined from when it's committed and it does not matter what happened to the proceeds"*** (see paragraphs **22 to 34, 53 to 63** of the Applicant's Heads of Argument). These material arguments on behalf of the Applicant were not addressed at all in the Defendant's Heads of Argument.

46 In paragraph 40.4 of the Defendant's Heads of Argument (**page 26**), the Defendant concluded that *"All the above actions indeed took place prior to the offence committed (paragraph 33)."*

47 From their Heads of Argument it is clear that the Defendant still avers that the EAP was appointed and the BA was conducted prior to commission of the offence.

48 This contention of the Defendant is made, despite overwhelming evidence to the contrary. In this respect, I refer the Honourable Court to the following evidence as contained in the Applicant's founding papers:

48.1 In paragraphs 10.7 and 10.8 (page 17) of his plea explanation in terms of Section 212(2) of the Criminal Procedure Act 51 of 1977 (**the CPA**) dated 23 June 2011 (**the Defendant's plea explanation**), Malloch-Brown declared and admitted the following:

"A stretch of the existing forestry road, some 800 metres in length, was ***widened with a road grader in late 2007****,* ***but without the requisite environmental authorization, preparatory to the construction of the proposed new road****."* **(my highlights)**

This widening is clearly visible on the Google image, annexed hereto marked ***"DMB 11"****, depicted by* ***"X"*** *to* ***"Y"****.*

48.2 In paragraphs 11.6; 11.7; 11.10 to 11.16 of the Defendant's plea explanation under a sub-heading named ***"The***

circumstances that led to the widening of the road", Malloch-Brown declared and admitted the following:

"11.6 The immediate spur to the construction of the proposed new road were ***the catastrophic forest fires of 2007****. Thousands of hectares of plantations were burned and it became necessary within a very short period of time to harvest the burned timber and to transport it to the sawmill before it dried." (****my highlights****).*

11.7 This emergency led to a substantial increase in the volumes of timber that had to be transported to the Sabie sawmill along the existing ramp road and required that the trucks operate day and night. This would have the effect of increasing noise, dust and light pollution for the residents of Sabie town. The situation was aggravated by the fact that the forest flanking the ramp road, which dampened the noise dust and light generated by road traffic, also burned down.

11.10 The re-routing of the ramp road was discussed with the forester responsible for the maintenance of forest roads and he was requested to survey and to mark out the route of the proposed new road.

11.11 The forester did so but, in his enthusiasm, he also instructed a roads contractor, who was on contract to York, to begin clearing the area adjacent to the existing forest road with a road scraper. The contractor scraped a stretch of road some 800 meters long and 3 metres wide.

11.12 When York's then environmental manager, Mr Sean McCarthy became aware of the scraping activity he immediately directed the contractor to stop and directed ***that the work should not continue until such time as an environmental authorization was obtained****. (****my highlights****)*.

11.13 York ***then appointed*** *a consultant, V&L Landscape Architects, to apply for an environmental authorization. (****my highlights****)*

11.14 In accordance with the law and the proper procedures, the consultant gave the authorities notice of the Sabie Sawmill's intention to apply for an environmental authorization, took steps to ensure that the requisite notices were posted and published and carried out a proper public participation exercise. A ***basic assessment report was submitted*** *to the environmental authorities* ***on 6 June 2008****. (****my highlights****)*

11.15 On 18 July 2008 the consultants made further submissions in response to a letter of objection received from the single objector, the Lone Creek River Lodge, and the various reports filed by them.

*11.16 On or about the **4th of August 2008** inspectors from the Department of environmental affairs who were carrying out a compliance inspection at the Sabie sawmill noted that the forest road had been scraped wider and initiated the process that culminated in these criminal proceedings." (**my highlights**)*

48.3 From the above quoted paragraphs from the Defendant's plea explanation, it is evident that the Defendant admitted that the offence was committed ***"in late 2007"*** after the ***"catastrophic forest fires of 2007"***. The Department of environmental affairs discovered this *"on or about the **4th of August 2008**";* almost a year later.

48.4 It is significant to note that in paragraph 10 of the answering affidavit, whereupon the Defendant relies in paragraphs 35 to 40 of its Heads of Argument, Malloch-Brown therein materially re-shuffles the sequence of events as he admitted to in the Defendant's plea explanation, as described above.

48.5 In paragraphs 10.17 to 10.19 of the answering affidavit, Malloch-Brown avers that the roads contractor, on instructions of the forester, begin grading the road after the Defendant appointed V & L Landscape Architects (**V & L**) on 11 February 2008 to apply for environmental authorization; after V & L gave the authorities notice of the proposed environmental application during March 2008; after the Basic Assessment Report (**the BAR**) was submitted to the environmental authorities on 6 June 2008 and after V & L made further submissions on 18 July 2008 in response to the letter of objection from Lone Creek River Lodge.

48.6 In paragraph 10 of the answering affidavit, Malloch-Brown deliberately omitted the following material facts that he originally admitted to in the plea explanation:

"A stretch of the existing forestry road, some 800 metres in length, was ***widened with a road grader in late 2007****, but without the requisite environmental authorization, preparatory to the construction of the proposed new road."*

48.7 In the answering affidavit Malloch-Brown deliberately re-shuffles the sequence of events and omitted the material facts as mentioned above, to create the false impression that the

offence was committed after the BAR was submitted to the environmental authorities.

48.8 This is an apparent attempt by Malloch-Brown to negate the fact that at the time that the offence was committed, **during late 2007**, the Defendant had not obtained the services of an environmental consultant to conduct a BAR; and/or was in possession of a BAR; and/or applied for authorization to the relevant environmental authorities to widen the road.

48.9 The Applicant submits that Malloch-Brown, in his answering affidavit, attempts to confuse and mislead the Honourable court of exactly when the offence was committed, to avoid the legal and financial consequences associated with the commission of the offence, namely the Defendant's benefit out of the crime.

48.10 Furthermore, in none of the documents that the Defendant and V & L (the subsequent appointed EAP) had submitted to DEDET on 3 June 2008 in support of their application for environmental authorization for the construction of the proposed new ramp road, did they disclose that the Defendant had already commenced with the illegal construction of the road.

48.11 In paragraph 10 of the affidavit of Robyn P Luyt (**Luyt**), she mentioned that she also received a letter dated 3 June 2008 from Ernst Basson Attorneys (**Basson**) on behalf of Lone Creek River Lodge (**LCRL**), a Registered Interested Party, marked **RPL 7** to her affidavit. RPL 7 shows that the letter was also addressed to V & L.

48.12 In paragraph 2 of RPL 7 under the heading **"Procedural concerns"** Basson alerted DEDET to photographs in the Final Appendix to the draft BAR that show that the proposed listed activity, namely the construction of the road, had already commenced.

48.13 Basson then proceed to explain to DEDET, V & L and therefore the Defendant what the legal effect and consequences were of the unauthorized commencement of the listed activity, namely that:

48.13.1 DEDET did not have the authority to authorize the Applicant's proposed ramp road in terms of section 24F of NEMA;

48.13.2 The Defendant should have cease its application in terms of Section 24F of NEMA, read with the regulation 21(1)(a) of GN R 385;

48.13.3 The Defendant should have submit an application to DEDET in terms of Section 24G of NEMA for rectification of the unlawful commencement or continuation of the listed activity; and

48.13.4 DEDET should then have strictly applied the provisions of Section 24G of NEMA.

48.14 From paragraph 3 of RPL 7 Basson proceed to inform DEDET, V & L and therefore the Defendant of fundamental shortcomings in the submitted BAR that were so material that DEDET could not be able to take a reasonable, informed and lawful decision to grant environmental authorization for the construction of the road. These shortcomings were, amongst others:

48.14.1 The BAR had no specialist report(s) that provided detailed information on critical technical vehicle information of the traffic that will be using the proposed road;

48.14.2 The BAR failed to provide independent specialist analysis of the cumulative environmental, social, health and economic effects in respect to different

parties living, working or doing business along the route of the trucks to and from the proposed road;

48.14.3 The BAR failed to provide a proper scientific investigation, supported by expert reports and/or monitoring results, of any of the advantages and disadvantages of alternative options or roads to the one in question; and

48.14.4 The BAR failed to comply with Section 24(4)(e) of NEMA that requires the assessment to have *"reported on gaps in knowledge, adequacy of predictive methods and underlying assumptions, and uncertainties encountered in compiling the required information."*

48.15 In paragraph 11 of Luyt's affidavit, she stated that after she had received the letter of Basson (RPL 7), she sent an electronic mail dated 3 June 2008 to Craig Gebbardt (**Gebbardt**) of V & L and received a reply thereto (See annexure **RPL 8** to Luyt's affidavit).

48.16 In RPL 8 to Luyt's affidavit, she confronted Gebbardt with the fundamental material non-disclosure in his submitted BAR of the fact that the Defendant (his client) already commenced with

the listed activity prior to environmental authorization. In RPL 8 Luyt stated the following to Gebbardt:

"The Procedural Concerns (Point 2) raised by Dr. Basson in the attached correspondence are of concern, as I was not aware that the applicant (York Timbers) had commenced with any activities illegally. Also, please could you clarify point 2.3 in which it is stated that MDALA informed the applicant to cease activities and undertake a BA process."

48.17 On the same day (3 June 2008) Luyt received an e-mailed response from Gebbardt wherein he, amongst others, stated the following:

"Point 2 – York Timber did commence with the grading of an existing forestry track which follows the initial 600 meters of the alignment of Alternative 2. ***This was halted prior to V & L being contacted by York Timbers."*** *(***my highlights***)*

49 In summary, there is overwhelming evidence in the Applicant's founding papers that the EAP was appointed and the BA was conducted long after the Defendant commenced with the listed activity.

50 The material non-disclosure of the commencement of the listed activity by the Defendant and V & L in the BAR (that was submitted to DEDET

on 3 June 2008) was clearly intentional to avoid the legal and financial consequences of a Section 24G of NEMA rectification application.

51 Furthermore, it is submitted that the non-disclosure of the material fact of the commencement of the listed activity to the authorities in the BAR was to intentionally mislead the authorities and amounts to fraud by the Defendant and the EAP. In this respect I also refer the Honourable court to **paragraphs 37 to 43** of O'Beirne's replying affidavit. See also **paragraphs 54 to 56 and 70 to 77** of the Applicant's Heads of Argument.

DOES O'BEIRNE'S AFFIDAVIT AMOUNTS TO HEARSAY?

52 In paragraph 34 of the Defendant's Heads of Argument, it is submitted that O'Beirne's affidavit amounts to hearsay evidence in respect of whether or not the Defendant incurred any costs to appoint an EAP and a BAR.

53 As submitted above, there is overwhelming evidence in the Applicant's founding papers that the EAP was appointed and the fraudulent BA was conducted long after the Defendant commenced with the listed activity. These unassailable facts are contained in the plea-explanation of the Defendant, as well as in the affidavits of the persons mentioned above, ie Luyt. This evidence is not hearsay.

54 If the Honourable court finds that the Defendant had not complied with the provisions of the NEMA and the regulations thereto **prior** to the commencement of the listed activity (ie the appointment of an EAP and the conducting of a BAR), it means that the Defendant had evaded or avoided the costs associated therewith.

55 The Applicant comprehensively dealt with the legal importance and relevance of the fact that the Defendant appointed an EAP who conducted a fraudulent BA long after they commenced with the listed activity. The Defendant elected to ignore these material submissions in its Heads of Argument and it stands unchallenged.

THE LACK OF LEGAL AUTHORITY FOR THE DEFENDANT'S SUBMISSIONS

56 The Applicant submits that good legal argument is always based on good legal authority.

57 In its Heads of Argument, the Applicant comprehensively dealt with numerous legal authority in support of its legal submissions.

58 A perusal of the Defendant's Heads of Argument shows a total lack of legal authority for the Defendant's legal submissions. For example, the Defendant does not quote any legal authority for its submission that the

Applicant is burdened with an onus *"to prove all issues relevant and required for an order of this nature."*

59 The lack of legal authority for the Defendant's submissions means that it is without legal basis and do not reflect the current *juris prudence*.

THE DETERRENT EFFECT OF A CONFISCATION ORDER

60 In the Applicant's Heads of Argument, it was submitted that an important factor that the Honourable court can take into consideration is the forward-looking justification of a confiscation order, namely the deterrent effect thereof. A confiscation order ensures that people and entities, like the Defendant, are deterred from deliberately evading or avoiding important statutory legislation which aim is to protect our precious environment.

61 This case is a typical example of a big company that, in its quest to make profit, flagrantly ignore the provisions of environmental legislation. This legislation has the honourable and admirable purpose of protecting our precious natural heritage. It is a modern scourge that big companies, in their pursued for profit, flagrantly ignore environmental legislation like the NEMA and the regulations thereto. They ignore the legislation to save costs and make profit and thereby destroying our precious natural heritage.

62 The POCA is a suitable tool to deter and prevent big companies like the Defendant to evade or avoid environmental legislation and to willy-nilly destroy our natural heritage. The judicious application of the POCA will encourage big companies like the Defendant to not only pursue profit, but also care for the environment in their operations.

IS THE DEFENDANT *IN CASU* ENTITLED TO ASK FOR THE COSTS OF SENIOR COUNSEL?

63 In paragraph 43 of his Heads of Argument the Defendant submits that he is entitled to a cost order including the cost of senior counsel. The Defendant submits that this application holds serious consequences for the Defendant and therefore the Defendant was entitled to employ the services of senior counsel.

64 The Applicant submits that the Defendant is not *"entitled"* in this matter to request the Honourable court for a cost order that include the cost of senior counsel.

65 It is significant to note that the Defendant has abandoned his initial request for a punitive cost order, on an attorney and own client scale against the Applicant (**see paragraph 74 of Malloch-Brown's answering affidavit**). The Defendant has apparently changed his submission that *"The application is devoid of any merit ... "* and "*the institution of these proceedings amounts to an abuse of legal process*

and is worthy of the strongest censure." (**see paragraph 71 and 72 of Malloch-Brown's answering affidavit**). Clearly the Defendant is realising that there is substantial merit in the Applicant's averments, namely, that the Defendant has derived a benefit out of its criminal activity.

66 Although the Defendant submits in his Heads of Argument that *"This application held serious consequences for the Defendant"*, the Defendant failed to inform the Honourable court, either in his answering affidavit or Heads or Argument what these serious consequences entail.

67 The Applicant finds it strange that, throughout this case, the Defendant employed the services of junior counsel, but at this very late stage decided to employ the services of a senior counsel. Surely, if this application holds serious consequences for the Defendant, they would have employed the services of senior counsel much earlier.

68 There is therefore no merit in the Defendant's submission that this case holds serious consequences for the Defendant and surely the employment of senior counsel at this very late stage was not warranted.

69 It is also submitted that this is litigation in the magistrate's court and the issues in dispute are not so complex to warrant senior counsel.

70 According to the rules of the Magistrates' Court Act (32 of 1944) the Honourable court has a discretion to allow fees for senior counsel only in certain defined and limited instances (**see Rule 33(8) read with Rule 33(12) of the Magistrates' Court rules**).

71 The Applicant submits that this case does not warrant the appointment of senior counsel by the Defendant and that the Defendant is not entitled to request the Honourable court for such fees.

CONCLUSION

72 The Applicant submits that the Defendant has benefitted from his criminal activity as stipulated in the founding affidavit of O'Beirne and the confirmatory affidavits thereto.

73 The Applicant further submits that the total value of the Defendant's benefit amounts to at least **R 450 000,00**.

74 The Applicant therefore request the Honourable Court to grant a confiscation order against the Defendant in terms of Section 18(1)(a) of the POCA:

74.1 In the amount of **R 450 000,00**; **plus**

74.2 Interest at the prescribed legal rate in terms of section 1(1) of the Prescribed Rate of Interest Act 55 of 1975 (15,5 %) from

the date of the granting of the confiscation order until the date of final payment; **and**

74.3 A punitive order of costs against the Defendant, on an attorney and own client scale, including the costs of counsel.

SJ van der Walt

Counsel for the Applicant

Nelspruit

6 December 2012